

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 47, (Case No. 47)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member

Samantha Rogers, Carrier Member

David D. Tanner, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 25, 2009, when Claimant, Norris A. Sullivan (1765668), was dismissed for entering into an altercation on August 24, 2009. The Carrier alleged violation of MOWOR Rule 1.6 Conduct.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing August 25, 2009, continuing forward and/or otherwise made whole."**
(Carrier File No. 14-09-0182) (Organization File No. 170-13A2-094.CLM)

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board had jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The undisputed facts are that on August 24, 2009, Claimant was involved in a physical altercation with co-worker B. E. Westley while boarding a company bus at Alma, WI, on or about 1720 hours while assigned as a Machine Operator on Rail Gang RP02 and because of that incident he was removed from service pending an Investigation. On August 25, 2009, Claimant and Mr. Westley were directed to attend a formal Investigation on September 2, 2009, which was mutually postponed until September 10, 2009, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged entering into a altercation, while boarding the bus at Alma, Wisconsin, on or about 1720 hours on August 24, 2009, while assigned as Machine Operators on RP02."

On September 30, 2009, Claimant was notified that he had been found guilty as charged and he was dismissed.

It is the Organization's position that the Carrier erred in its dismissal of the Claimant. It argued that the facts reveal that the Claimant merely defended himself from an aggressive attacker. Additionally, it argued that if the Carrier had produced any evidence (which it did not) to support their charges, the discipline issued was excessive in proportion to the allegations. It closed by stating that the Carrier did not meet its burden of proof and requested that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record substantiates that the Claimant entered into an altercation with a co-worker in violation of Rule 1.6 - Conduct when he struck that employee causing a fractured cheekbone. It argued that type of behavior cannot be tolerated in the workplace as it creates a dangerous environment which other employees should not be subjected to. It concluded that based upon the seriousness of the charges the discipline was appropriate and it asked that it not be disturbed.

The Board has thoroughly reviewed the record and found that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11. The Board further notes that this is a companion case to Award No. 48, Case No. 48 of this tribunal as both cases involve the participants (Sullivan and Westley) in the incident that transpired on August 24, 2009, which is in dispute.

There is no disagreement between the parties that the Claimant entered into an altercation with Mr. B. E. Westley on August 24, 2009. Claimant argued that Westley was the aggressor and he merely defended himself to avoid bodily harm. On pages 12 and 13 of the Transcript, Senior Special Agent M. Moody was questioned about the incident wherein he read from his prepared narrative involving his investigative work. He stated in pertinent part the following:

"...Mr. Westley admitted to having a confrontation with Mr. Sullivan at the door of the bus and stated that he attempted to hit Mr. Sullivan and missed and ended up on the ground and that was all he remembered."

Moody went on to testify that earlier in the day Claimant reported to his Foreman, Mr. Dorrell that Westley intentionally bumped into him and that Foreman Dorrell talked to both employees

and told them to stay clear of each other and behave as adults which was confirmed by Dorrell in his testimony. Officer Moody further testified on page 13 of the Transcript as follows:

"At the end of the day while the crew was boarding the bus Mr. Sullivan and Mr. Westley approached the door of the bus at about the same time. Mr. Sullivan enters first and Mr. Westley strikes him in the center of the back. Mr. Sullivan turns around and Mr. Westley is in a fighting stance. Mr. Westley throws a punch at Mr. Sullivan missing him and ends up on the ground. Mr. Westley then gets up again taking a fighting stance and Mr. Sullivan punches him on the right side of the face and Mr. Westley again goes down."

On page 19 of the Transcript Moody testified regarding Westley's behavior as follows:

"...he was the instigator of the incident and from what I could tell from the information that I had seen and that I had taken Mr. Sullivan was defending himself."

Ken Hughes, the Bus Driver who witnessed the altercation wrote in his statement the following:

"Viewing the incident from the driver's seat, Norris and Bill were attempting to get on the bus at the same time. Neither of them gave way to get on first. They then bumped into each other and Norris continued onto the bus. Bill then hit Norris (with a stabbing motion) in the back. Norris then turns around. Bill swings, misses, and falls to the ground. Bill then gets back up and swings at Norris again. Norris hits Bill and Bill falls to the ground." *(Underlining Board's emphasis - and the Board notes for the record that Norris is the Claimant and Bill is co-worker Westley)*

Employee, Leigh Orvis, was another witness of the incident and he wrote the following:

"I saw Bill & Norris meet at the bus door, Norris proceeded onto the stair, Bill nudged into Norris like kids cutting into a lunch line with his forearm and elbow. Norris now had both feet onto bus stairs, facing into the bus. I saw Bill assault Norris in the middle of his back with his forearms and closed fist "hammer style". Then as Norris turned around and stepped to the ground, Bill was jumping around like boxers with both fists up saying Cmon, cmon. Bill was elevated on a berm. Norris' hands were down. Norris said "you only have to swing 1 time". Bill attacked Norris, feet almost off the ground with a closed fist towards Norris' face from the berm of the road. Norris moved left avoided contact, Bill landed on the step & the bus then the ground. Norris backed away, towards the front of the bus. I was now 2 feet away, moving backwards at a tripping pace. I had the same view

as Norris. Bill immediately, flipped out, headed towards Norris with his fist up for another swing. But Norris and I were still moving backwards. If Norris was tackled or ducked, I would have been assaulted. Until the final moment, Norris had to defend himself, he stopped, took 1 swing, connected to Bills head. I'm sure it was head level, I did not see where on the head Bill he was hit. It knocked Bill down, he was loopy and stumbled to get to his feet. Norris did not follow up, or towards Bill. No more confrontation, no yelling." (*Underlining Board's emphasis*)


Witness, Sam Sportsman, offered a similar statement as the two above confirming that Westley was the aggressor.

Witnesses Hughes and Orvis probably summed it up best that Claimant and Westley behaved childish when one would not give way to the other or the other tried to cut in ahead. The Organization is correct that Mr. Westley was the instigator of the altercation, however, its argument that the Claimant was "merely defending himself" oversimplifies the incident, as it overlooks the fact that when Westley first pushed or punched the Claimant in the back while he was on the step he did not proceed onto the bus, but instead chose to step back down to the ground and confront Westley. Claimant made the mistake of accepting Westley's invitation to fight and even challenged him to do something when according to witness Orvis he said: "**you only have to swing 1 time**". We understand that it can be difficult to walk away, and simply report the incident when an instigator is provoking a confrontation, but that would have been the wise thing to have done. It is clear that substantial evidence was adduced at the Investigation that the Claimant entered into an altercation on August 24, 2009.


The only issue remaining is whether the discipline was appropriate. The Board does not excuse the Claimant's behavior as he was culpable for his actions. However, due to mitigating circumstances and the fact that the Claimant was not the instigator of the incident we have determined that even though the Carrier had reason to invoke discipline for Claimant's participation in an altercation the discipline was too severe and it is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Therefore, the Board finds and holds that the Claimant is to be reinstated with seniority intact and all other rights unimpaired without backpay. Upon return to service Claimant's disciplinary status will be considered to be at the PEPA Serious Rule Violation level covered by Paragraph (c.)

AWARD

Claim sustained in accordance with the Findings and the Carrier is ordered to make the Award effective on or before 30 days following the date the Award is signed by the parties.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 3/18/11